

**ST 05-21**

**Tax Type: Sales Tax**

**Issue: Exemption From Tax (Charitable or Other Exempt Types)**

**STATE OF ILLINOIS  
DEPARTMENT OF REVENUE  
OFFICE OF ADMINISTRATIVE HEARINGS  
CHICAGO, ILLINOIS**

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<b>ABC PUBLIC FACILITIES</b>	)	Docket No.	04-ST-0000
<b>CORPORATION,</b>	)	IBT No.	0000-0000
Taxpayer	)		
v.	)		
<b>THE DEPARTMENT OF REVENUE</b>	)	John E. White,	
<b>OF THE STATE OF ILLINOIS</b>	)	Administrative Law Judge	

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**RECOMMENDATION FOR DISPOSITION**

**Appearances:** Gerard Dempsey, Klein, Thorpe & Jenkins, Ltd., appeared for ABC Public Facilities Corporation; John Alshuler, Special Assistant Attorney General, appeared for the Illinois Department of Revenue.

**Synopsis:**

This matter arose when ABC Public Facilities Corporation (ABC, or taxpayer) protested the Illinois Department of Revenue's (Department) denial of its application for tax exempt status as an exclusively charitable organization. In a pre-hearing order, the parties agreed that the issues to be resolved at hearing were: "[1] Whether the Village of ABC is the owner of the Convention Hall & Hotel Facility for which a sales tax exemption is being sought by [ABC;] [2] Whether [ABC] is a governmental body for purposes of exemption from the application of tax to its purchases of tangible personal property, and [3] Whether [ABC] can make tax free purchases on behalf of the Village of ABC."

The hearing was held at the Department's offices in Chicago. Taxpayer presented documentary evidence consisting of books and records, as well as the testimony of *John Doe*, the Director of Finance for the Village of *ABC* (*ABC*). I have reviewed that evidence, and I am including in this recommendation findings of fact and conclusions of law. I recommend the matter be resolved in favor of the Department.

**Findings of Fact:**

1. *ABC* is an Illinois not-for profit corporation that was formed by the Village of *ABC*. Taxpayer Ex. 2 (copies of *ABC*'s original articles of incorporation and by-laws); Taxpayer Ex. 3 (copy of Resolution No. 118-05), § 1.B.
2. The sole incorporator of *ABC* was *John Doe* (*Doe*), *ABC*'s Director of Finance. Taxpayer Ex. 2, p. 2; Hearing Transcript (Tr.), p. 16 (testimony of *Doe*).
3. Just before *ABC* was incorporated, *ABC* passed Ordinance 5351, An Ordinance Approving the *ABC* Public Facilities Corporation. Taxpayer Ex. 1 (copies of *ABC* Ordinance 5351, and accompanying seal and certification of *ABC*'s keeper of records).
4. *ABC*'s Ordinance 5351 provided, in pertinent part:

ORDINANCE NO. 5351  
AN ORDINANCE APPROVING THE *ABC*  
PUBLIC FACILITIES CORPORATION

WHEREAS, the *ABC* Public Facilities Corporation (the "PFC") is to be formed as a not-for-profit corporation to assist in the financing and construction of a convention hall and hotel facility in the Village of *ABC* (the "Village");

NOW, THEREFORE, BE IT ORDAINED, by the President and Board of Trustees of the Village of *ABC*, *Anywhere* County, Illinois, as follows:

SECTION 1. That it is hereby determined to be proper and in the public interest of the citizens of the Village to approve the incorporation of the corporation known and

designated as the [ABC] for the purpose of financing, constructing and equipping a convention hall and hotel and related facilities in the Village.

SECTION 2. That the Articles of Incorporation and By-Laws of the PFC, presented to and now before this Board, are hereby approved, copies of same being attached hereto as Exhibits A and B, respectively, and made parts hereof.

SECTION 3. That providing for the financing, constructing and equipping of such convention hall and hotel facilities by the PFC is in the public interest of the citizens of this Village and it is a proper public purpose in relation to which the President and Board of Trustees agree to cooperate with the PFC and to assist it in fulfilling the requirements of all agencies of the federal, state and local governments.

SECTION 4. That the issuance, sale and delivery by the PFC of one or more series of bonds designated [ABC] Convention Hall and Hotel Revenue Bonds, with such other notations to designate the specific series as needed, in the aggregate principal amount of not to exceed \$160,000,000 is hereby approved.

SECTION 5. That, upon the redemption or retirement of the bonds to be issued by the PFC, the Village will accept from the PFC title to such convention hall and hotel facilities, free and clear of any and all liens and encumbrances thereon.

SECTION 6. That the President and Board of Trustees hereby approve the following to act as initial Directors of the PFC:.....

SECTION 7. That the PFC may issue, sell and deliver its bonds, pursuant to the applicable laws of the State of Illinois, may encumber any real property or equipment acquired by it for the purpose of financing the construction and equipping of such convention hall and hotel facilities and may enter into contracts for the sale of the bonds and the construction and acquisition of such convention hall and hotel and facilities.

SECTION 8. That this Ordinance shall be in full force and effect from and after its passage and approval as provided by law.

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APPROVED by met this 4<sup>th</sup> day of September, 2003.

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Taxpayer Ex. 1.

5. *ABC's* Articles of Incorporation include the following Articles:

Article 4. The purposes for which the corporation is organized are: charitable and civic; the Corporation is organized solely

for the purpose of acquiring a site or sites appropriate for a convention hall and hotel, and the necessary amenities thereto, including, but not limited to, restaurants, constructing, building, or equipping thereon a convention hall and hotel, including the necessary equipment and appurtenances thereto, including but not limited thereto, restaurants and a parking facility, and collecting the revenues therefrom, entirely without profit to the Corporation, its officers and directors.

Article 5. Nonprofit Purposes.

- (a) The Corporation is organized exclusively for the promotion of social welfare and for not-for-profit purposes and to assist the Village of *ABC* in its essential governmental purposes. No part of the net earnings of the Corporation shall inure to the benefit of or be distributable to its directors, officers, or other private persons, except that the Corporation shall be authorized and empowered to pay reasonable compensation for services rendered and to make payments and distributions in furtherance of the purposes set forth in Article 4.
- (b) The Corporation shall not engage in carrying on propaganda, or otherwise attempt to influence legislation, and the Corporation shall not participate in, or intervene in (including the publication or distribution of statements) any political campaign on behalf of any candidate for public office.
- (c) Notwithstanding any other provision of these Articles of Incorporation, the Corporation shall not carry on any activities or exercise any power or authority in any manner other than those which constitute essential governmental functions under Section 115 of the Internal Revenue Code of 1986, or corresponding provisions of any subsequent federal tax laws.
- (d) Upon dissolution of the Corporation, the Board of Directors shall, after paying or making provision for the payment of all liabilities of the Corporation, dispose of all assets of the Corporation to the Village of *ABC* or its successor.

Taxpayer Ex. 2 (Articles of Incorporation), Arts. 4-5.

- 6. *ABC*'s By-Laws provide that *ABC*'s Village President shall appoint its five initial Directors, and subsequent Directors, with the advice and consent of *ABC*'s Board of Trustees. Taxpayer Ex. 2 (copy of *ABC*'s by-laws), Art. IV. §§ 4.1-4.2. *ABC*'s

- President and Board of Directors must approve any amendment to Article IV (Board of Directors) of *ABC's* By-Laws. Taxpayer Ex. 2 (By-Laws), Art. VII § 7.1.
7. *ABC* contracts under its own name. Taxpayer Ex. 2, Art. VI. §§ 6.2.
  8. On April 7, 2005, *ABC* passed Resolution No. 118-05, titled “A Resolution Approving a Tax Rebate And a Letter of Credit Agreement In Regard to the Development of a Convention Hall and Hotel in the Village of *ABC*, *Anywhere* County, Illinois.” Taxpayer Ex. 3 (Resolution 118-05).
  9. On the same date, *ABC* and *ABC* entered into a Tax Rebate Agreement Between the [*ABC*] and the village of *ABC*, *Anywhere* County, Illinois, In Regard to the Development of a Convention Hall and Hotel in the Village of *ABC*”. Taxpayer Ex. 3 (copy of Tax Rebate Agreement).
  10. The Tax Rebate Agreement provided, in part:
    - I. Preliminary Statements

Among the matters of mutual inducement which have resulted in this Agreement are the following:

      - A. The Village is an Illinois municipality pursuant to Section 7 of Article VII of the Constitution of the State of Illinois of 1970.
      - B. Within the corporate limits of the Village, is an approximately 6.69 acre parcel of real estate generally located at the Northeast corner of the Yorktown Shopping Center ... (hereinafter referred to as the Subject Property).
      - C. The *ABC* is, or in the very near future will be, the fee simple owner of the Subject Property.
      - D. The Village has long desired to encourage the development of a hotel and convention hall with associated banquet facilities, restaurants and other facilities (the “Hotel and Convention Hall”) as a means of promoting tourism and other business activity within the Village.
      - E. The Village has determined that the optimal financial structure for the financing of a Hotel and Convention Hall development will include, among other things, the issuance

of tax exempt bonds through the *ABC*, coupled with the rebate by the Village of all hotel/motel taxes, all retailers' occupation taxes, all service occupation taxes and all places of eating taxes generated by the Hotel and Convention Hall or the operation thereof, along with the provision of additional reserve funds, as security for a portion of said bonds.

- F. The *ABC* has indicated its desire to issue tax exempt revenue bonds (the "Bond Financing") and develop a Hotel and Convention Hall on the Subject Property (collectively the "Project"), all as described in Exhibit B attached hereto and made part hereof (the "Project Description").

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- H. The Bond Financing requires the *ABC* to issue senior lien tax exempt revenue bonds and subordinate lien tax exempt revenue bonds in a sufficient amount to provide funds to construct the Hotel and Convention Hall, establish various reserves and pay the costs of issuance and otherwise complete the Project, all as generally described in the Project Description.
- I. In regard to the Subject Property, the Village has determined as follows:
1. The Subject Property is vacant and has remained vacant for at least one (1) year;
  2. The Project is expected to create job opportunities within the Village;
  3. The Project will serve to further the development of adjacent areas;
  4. Without this Agreement, the Project would not be possible;
  5. The operator of the Hotel and Convention Hall, as selected by the *ABC* to operate the Hotel and Convention Hall on behalf of the *ABC*, meets/will meet the criteria set forth in 65 ILCS 5/8-11-20(6)(A) and/or (B);
  6. The Project will strengthen the tax base of the Village; and
  7. The rebate of hotel/motel taxes, as provided for by 65 ILCS 5/8-3-14 and Sections 98.60 through 98.63 of the *ABC* Village Code, will promote overnight stays within the Village at the hotel portion of the Project, and will promote conventions within the Village at the convention hall portion of the Project.
- J. Article VII, Section 10 of the Illinois Constitution of 1970 authorizes municipalities to contract and otherwise associate with individuals, associations and corporations in

any manner not prohibited by law or ordinance.

- K. The Village is authorized to proceed with the Project pursuant to the Illinois Compiled Statutes, 65 ILCS 5/11-65-1 et seq., in that the Village will become the owner of the Hotel and Convention Hall upon the repayment of all of the bonds issued by the *ABC*.
- L. As the Village will become the owner of the Hotel and Convention Hall upon the repayment of all of the bonds issued by the *ABC*, the Village will benefit from the tax rebates referenced in subsection I.E. above.
- M. It is anticipated that the Project will generate increased hotel/motel tax revenues, places of eating tax revenues, retail occupation tax revenues and service occupation tax revenues for the Village.
- N. It is anticipated that the Project will generate increased employment opportunities for residents of the Village.
- O. Construction of the Project would not be economically feasible for the *ABC* without the Village's economic assistance.
- P. The Village is desirous of having the Subject Property rehabilitated, developed and redeveloped in order to serve the needs of the Village, increase employment opportunities, stimulate commercial growth and stabilize the tax base of the Village and in furtherance thereof, the Village is willing to undertake certain incentives, under the terms and conditions herein set forth, to assist the *ABC*.
- Q. The President and Board of Trustees of the Village have determined that it is in the best interests of the Village to enter into this Agreement and pursue the development of the Project.

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V. Refund of Taxes/Additional Reserves

- A. The Village hereby pledges and shall semi-annually refund to the *ABC*, or pay as directed by the *ABC*, within 90 days after the end of each Semi-Annual Period (as said term is defined in subsection B below), an amount equal to the amount the Village has received from the collection of the Tax Revenue (as said term is defined in subsection C below) generated by the Hotel and Convention Hall during said Semi-Annual Period, solely for the purpose of securing the Series "B" Bonds as refinanced in the Project Proforma.
- B. The aforementioned refund of Tax Revenue to the *ABC* shall take place beginning in 2006 and ending at such time as the Series "B" Bonds are defeased or redeemed in their entirety, even if said defeasance or redemption occurs prior to the date shown in the Project Proforma. For purposes of

this Agreement, the semi-annual refund periods shall be from January 1<sup>st</sup> through June 30<sup>th</sup> and from July 1<sup>st</sup> through December 31<sup>st</sup> (each semi-annual refund period being hereinafter referred to as a Semi-Annual Period”). The *ABC* and the Village agree to cooperate with each other in ascertaining the amount of Tax Revenue generated by the Hotel and Convention Hall and received by the Village during each Semi-Annual Period, with the *ABC* to release such information in its possession and control, and use reasonable efforts to cause Harp [an Illinois limited liability corporation with which *ABC* entered into a master development agreement and an asset management agreement, and with which *ABC* entered into an agreement, see Agreement, § II.C. & D.], the hotel manager and restaurant manager(s) to release information and execute such documents as necessary to allow the Village to comply with its tax obligations as set forth in Section V.A. above.

- C. For purposes of this Agreement, “Tax Revenue” shall be construed to refer to that net portion of taxes imposed by the State of Illinois for distribution to the Village pursuant to the Retailers’ Occupation Tax Act, 35 ILCS 120/1 et seq. and the Service Occupation Tax Act, 35 ILCS 115/1, et seq. (and amendments thereto), which are collected by the State of Illinois and distributed to the Village, along with hotel/motel taxes collected by the Village pursuant to Sections 98.60 through 98.63 of the *ABC* Village Code (as authorized by 65 ILCS 5/8-3-14) and places of eating taxes collected by the Village pursuant to Section 98.111 of the *ABC* Village Code (as authorized by 65 ILCS 5/11-42-5), plus all future revenues derived during the period of this Agreement from taxes enacted by law or ordinance by any governmental authority which are intended to replace any one or more of the aforementioned taxes generated by the Project.

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#### VI. Additional Covenants, Undertakings and Agreements of the Parties

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- H. This Agreement relates to the development of real estate located in the State of Illinois. Accordingly, this Agreement, and all questions of interpretation, construction and enforcement hereof, and all controversies hereunder, shall be governed by the applicable statutory and common law of the State of Illinois. The parties agree that for the purpose of any litigation relative to the this Agreement and

its enforcement, venue shall be in either the Circuit Court of *Anywhere* County, Illinois, or the U.S. District Court for the Northern District of Illinois, Eastern Division, and the parties consent to the in personam jurisdiction of either of said Courts for any such action or proceeding.

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- O. The *ABC* hereby covenants and agrees to promptly pay or cause to be paid as the same become due, any and all taxes and governmental charges of any kind that may at any time be lawfully assessed with respect to the Project.

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#### VII. Representations and Warranties of the *ABC*

- A. The *ABC* hereby represents and warrants that it is an Illinois not-for-profit corporation in good standing with proper authority to execute this Agreement pursuant to its Articles of Incorporation, By-Laws and the laws of the State of its organization.
- B. The *ABC* hereby represents and warrants that the Project shall be constructed and fully completed in a good and workmanlike manner and in accordance with all applicable laws, rules and regulations of the Village, the State of Illinois and the United States of America, and all agencies thereof.
- C. The *ABC* hereby represents and warrants that it shall comply with all terms, provisions and conditions and shall not knowingly permit a default under any document or agreement relating to the Project to which it is a party, including, but not limited to this Agreement and all agreements and documentation in connection with the Bond Financing.
- D. The *ABC* hereby represents and warrants that it will use commercially reasonable efforts to alert Village residents to the employment opportunities available as a result of this Project.

#### VIII. Representations and Warranties of the Village

- A. The Village hereby represents and warrants to the *ABC* that subject to its compliance with the Illinois Statutes and its own Ordinances, it has the power and authority to execute, deliver and perform the terms and obligations of this Agreement and the Exhibits hereto.
- B. Subject to the terms and conditions of Section V of this Agreement, the Village has full authority to refund to the *ABC* the Tax Revenue generated by the Hotel and Convention Hall as distributed to the Village by the Illinois Department of Revenue or as collected directly by the Village.

- C. The Village agrees that during the term of this Agreement, the Village shall not further encumber or pledge any portion of the Tax Revenue or take any action inconsistent with the terms of this Agreement.

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Taxpayer Ex. 3 (Tax Rebate Agreement).

11. Exhibit B of the Tax Rebate Agreement consists of a Project Description, which provides:

(A) Project. It is currently contemplated that the Project will consist of a convention hall (“Convention Center” or the “Convention Hall”) containing approximately 50,000 square feet of net meeting space and a Hotel containing approximately 500 rooms.

1. The Hotel will consist of the above conference space and the following:

- Approximately 500 guest rooms, which will include an appropriate mix of King Rooms, Double Queens, and several types of suites
- Spacious lobby
- Up to two restaurants, each with full cocktail capabilities with a total area of no more than 16,000 sf, exclusive of the Hotel café
- Swimming pool and workout facilities
- Gift shop
- Kitchen and Back-of-House areas to support all of the above guest areas
- Employee spaces
- Security offices
- Executive offices for Hotel Management
- Storage facilities as appropriate
- Laundry facility for all Hotel requirements

2. The Convention Center is currently designed to encompass the following:

- +/- 20,000 SF Grand Ballroom; divisible
- +/- 10,000 SF Ballroom; divisible
- +/- 10,000 SF Breakout Meeting Rooms; divisible
- +/-10,000 SF of small meeting rooms and boardroom space
- Pre-function space and support facilities for all of the above

3. Based on the floor areas described above, the Project will also include surface parking for approximately 300

cars and in a parking structure that will contain approximately 610 parking stalls. \*\*\*

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(B) Structure: The Project consisting of a Convention Hall and Hotel facility as described above will be constructed and equipped with proceeds of bonds to be issued by a corporation to be formed under the Illinois not for profit corporation statute (the “Public Facilities Corporation” or the “PFC”). The [PFC] will be organized in compliance with federal tax law to enable it to issue tax exempt bonds on behalf of the Village of ABC. All of the PFC directors will be appointed by and serve at the pleasure of the Village. Upon retirement of the bonds, unencumbered fee title to all facilities constructed with bond proceeds will pass to the Village.

The bonds will be issued in three series, all secured by a pledge of the new revenues of the Hotel and Convention Hall, the Village’s hotel/motel tax receipts and sales taxes generated by the Hotel and Convention Hall. Series A will be the senior bonds, Series B will be junior to series A, and series C will be junior to series B. Neither in the taxing power nor the full faith and credit of the Village will be pledged as security for any of the Bonds.

Bond proceeds will be used to acquire the Property and construct and equip the Hotel and Convention Hall of[n] the property and the parking structure. An escrow will be created at the time of closing of the bonds to pay for off-site improvements that will benefit the Hotel and Convention Hall and adjacent areas. Bond proceeds will also provide for the payment of interest on the bonds through the completion of construction of the facilities and costs of issuance of the bonds.

The bonds will be issued pursuant to a trust indenture with a bank. The trust indenture will provide all of the details of the bonds and how the proceeds will be invested and applied. The trust indenture will be approved by resolution of the board of directors of the [PFC] following the execution of a bond purchase contract providing for the sale of the bonds to an investment banking firm. The investment banking firm will then resell the bonds to the public. At the bond closing, the investment banking firm will deliver cash in exchange for the bonds. The [PFC]. [sic] Harp ABC, LLC will have a Development Agreement and an Asset Management Agreement with the PFC.

The [PFC] will enter into a management contract

with an entity to operate the Hotel and Convention Hall on a day to day basis. The management company will be responsible for the successful operation of the facilities so as to generate the revenues and sales taxes to discharge the [PFC's] debt service obligations on the bonds. As indicated above, when the bonds are fully discharged, the [PFC] will deed the facilities to the Village and cease to exist.

Taxpayer Ex. 3, Ex. B.

12. Acting as the Village of ABC's Director of Finance, *Doe* prepared the first presentation of a project to build a hotel and convention center within the Village. Tr. pp. 17-18 (*Doe*). *Doe* has been involved in all aspects of the project. *Id.*, *passim*.
13. In planning, *Doe* anticipated that the total cost of the desired hotel and convention hall project would be 192 million dollars. Tr. p. 19 (*Doe*).
14. ABC is a non-home rule community. See Tr. p. 19 (*Doe*).
15. Section 8-5-1 of the Illinois Municipal Code provides, in pertinent part:

Except as hereinafter provided in this Division 5, no municipality having a population of less than 500,000 shall become indebted in any manner or for any purpose, to an amount, including existing indebtedness in the aggregate exceeding 8.625% on the value of the taxable property therein, to be ascertained by the last assessment for state and county purposes, previous to the incurring of the indebtedness or, until January 1, 1983, if greater, the sum that is produced by multiplying the municipality's 1978 equalized assessed valuation by the debt limitation percentage in effect on January 1, 1979.

65 ILCS 5/8-5-1.

16. *Doe* estimated that, in 2004, 8.625% of the value of the taxable property within the Village of ABC amounted to approximately 106 million dollars. Tr. p. 19 (*Doe*). Thus, even if ABC sought, by referendum, to authorize the issuance of

general obligation bonds to finance the construction of a convention hall and hotel, it lacked the authority to issue such bonds in an amount sufficient to finance the project desired. *Id.*, pp. 19-23 (*Doe*).

**Conclusions of Law:**

This matter involves the propriety of the Department's denial of *ABC*'s application for an active exemption identification number described in UTA § 3-5(4), so that it might purchase tangible personal property at retail, without paying use tax. Section 7 of the ROTA, which is incorporated by § 12 of the UTA, provides, in pertinent part:

It shall be presumed that all sales of tangible personal property are subject to tax under this Act until the contrary is established, and the burden of proving that a transaction is not taxable hereunder shall be on upon the person who would be required to remit the tax to the Department if such transaction is taxable. \*\*\*

35 **ILCS** 120/7.

Section 7 also places the burden on a taxpayer who wants to show that it is entitled to certain deductions authorized by statute. 35 **ILCS** 120/7. Thus, in this case, the Department established its prima facie case when it introduced Department Exhibit 1 under the certificate of the Director. Department Ex. 1; Tr. p. 13. That exhibit, without more, constitutes prima facie proof that *ABC* is not entitled to the sought-after exemption. 35 **ILCS** 105/12; 35 **ILCS** 120/7-8. The Department's prima facie case is overcome, and the burden shifts to the Department to prove its case, only after a taxpayer presents evidence that is consistent, probable and closely identified with its books and records, to show that the Department's determinations were not correct. Copilevitz v. Department of Revenue, 41 Ill. 2d 154, 157-58, 242 N.E.2d 205, 207 (1968). Additionally, "... when a

taxpayer claims that he is exempt from a particular tax, ... the burden of proof is on the taxpayer.” Balla v. Department of Revenue, 96 Ill. App. 3d 293, 296, 421 N.E.2d 236, 238 (1<sup>st</sup> Dist. 1981) (*citing* Telco Leasing, Inc. v. Allphin, 63 Ill. 2d 305, 347 N.E.2d 729 (1976); Bodine Electric Co. v. Allphin, 81 Ill. 2d 502, 410 N.E.2d 828 (1980)).

While the text of the denial suggests that *ABC* may have originally applied for an exemption identification number as an exclusively charitable organization, *ABC* has since made it clear that its request is based on its assertion that it is a governmental body. *See* Tr. pp. 11-12 (opening statement); Pre-Trial Order; Taxpayer’s Brief, p. 2 (“\*\*\* The *ABC* responded [to the Department’s pre-denial request for more information from *ABC*] in a letter dated February 20, 2004 stating that the *ABC* is a governmental body of the Village and outlined the history and purpose of the *ABC*. **The LPFC emphasized that it was not seeking the tax-exempt number as a charitable organization, but rather as an agency or instrumentality of the Village.**”) (emphasis added). Because taxpayer has abandoned<sup>1</sup> any argument that it is entitled to an exemption as an exclusively charitable organization, there is no need to analyze taxpayer’s status or activities pursuant to the guidelines established by the Illinois Supreme Court in Methodist Old Peoples Home v. Korzen, 39 Ill. 2d 149, 233 N.E.2d 537 (1968), and more recently, in Eden Retirement Center, Inc. v. Department of Revenue, 213 Ill. 2d 273, 287, 821 N.E.2d 240, 248 (2004).

Regarding the question whether *ABC* is a governmental body, Department counsel urges that, ordinarily, there is no question about whether an entity “qualifies” as a governmental body or not — it either obviously is, or it obviously is not. Tr. pp. 7-8 (opening statement). The Department argues that in this case, however, there is an issue

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<sup>1</sup> I conclude that *ABC* abandoned such arguments, as opposed to merely waived them, since *ABC* has voluntarily relinquished a known right regarding its status.

whether *ABC* qualifies as a governmental body, and taxpayer has failed to establish that it is one. *Id.*, p. 8. It further asserts that *ABC* has not established that the property sought to be developed is owned by a governmental body. *Id.*

Counsel for *ABC* cites three points of authority for its argument that it should be granted an exemption as a governmental body because it acts as an agency or instrumentality of the Village of *ABC*. Taxpayer's Brief, pp. 3-4. First, it cites Southern Illinois University Foundation v. Booker, 98 Ill. App. 3d 1062, 425 N.E.2d 465 (5<sup>th</sup> Dist. 1981). It next cites to a revenue ruling and a private letter ruling published by the Internal Revenue Service (IRS). Taxpayer's Brief, p. 4 (citing, respectively, Rev. Rul. 63-20, and LTR 200406003 (October 31, 2003)). I address each authority in turn.

The matter in SIU Foundation v. Booker involved a complaint for a permanent injunction that the SIU Foundation, an Illinois not-for-profit corporation, filed to enjoin the Jackson County Supervisor of Assessments, its Treasurer, and its State's Attorney, from collecting or attempting to collect property taxes assessed against certain real estate situated in Jackson County and commonly known as Evergreen Terrace. SIU Foundation, 98 Ill. App. 3d at 1063, 425 N.E.2d at 466. The Foundation held title to that property, and leased it to Southern Illinois University primarily for use as married student housing. *Id.* The issue was whether such property was exempt from property tax under either § 19.5 or § 19.1 of the Illinois Property Tax Code (PTC). *Id.* At the time, PTC § 19.5 exempted from taxation property belonging to the State of Illinois, whereas § 19.1 exempted property of schools used “exclusively for school purposes, not leased by such schools or otherwise used with a view to profit including, but not limited to, student residence halls, dormitories and other housing facilities for students and their spouses and

children.” *Id.* The appellate court concluded that the Foundation held mere naked title to the property, and that the property could be considered to belong to the State.

While SIU Foundation may have been applicable to the first issue articulated within the parties’ pre-hearing order, had this matter involved an exemption application for the property to which *ABC* holds title, it is only the second and third issues that need to be addressed here. SIU Foundation turned on the question of who owned real property and, to a lesser degree, the use to which such property was put. SIU Foundation, 98 Ill. App. 3d at 1063, 425 N.E.2d at 466 (while deciding that the property belonged to the State ended the case, the court nevertheless proceeded to also hold that the property was used exclusively for school purposes). The holdings in SIU Foundation, moreover, were specifically premised on the parties’ detailed stipulations of fact in that case. *Id.*, at 1065-67, 425 N.E.2d at 467-69. There are no such stipulated facts presented here. Finally, the question whether the statutory phrase “property belonging to the State of Illinois” *may*, under certain circumstances, be understood to include property whose title is held by someone other than the State, is categorically distinct from the question whether the statutory term “a governmental body” may or must be read to include non-governmental bodies that act as an agency or instrumentality of a governmental body.

If the Illinois General Assembly really did intend the term to include any non-profit corporation that acts as an agency or instrumentality of a governmental body, then the statute *must* be read to give effect to that intent. *Id.* On the other hand, if that construction is merely permissible from reading the context of UTA § 3-5(4), which is to say that, if a court could conclude that the term governmental body may rationally be construed to include only governmental bodies themselves, or that the term may

rationally be construed to include both governmental bodies and, under certain circumstances, non-profit corporations that act as an agency or instrumentality of a governmental body, then — and to the extent that term is included within an exemption provision — such a statute *must* be read in favor of taxation. Wyndemere Retirement Community v. Department of Revenue, 274 Ill. App. 3d 455, 459, 654 N.E.2d 608, 611 (2d Dist. 1995) (“A statute which exempts property or an entity from taxation must be strictly construed in favor of taxation and against exemption .... In analyzing an exemption, all facts are to be construed and all debatable questions resolved in favor of taxation.”).

Taxpayer’s argument that it should be considered a governmental body because it is an agency or instrumentality of the Village of *ABC*, in effect, asks that I construe UTA § 3-5(4) as though the term “a governmental body” included non-profit corporations (i.e., non-governmental bodies) that act as an agency or instrumentality of a governmental body. Clearly, the Department’s Denial of taxpayer’s exemption application establishes that *it* does not construe the term to include an entity like *ABC*.

In any matter in which the meaning of the text of a statutory provision is called into question, the job is to read that text so as to give effect to the legislature’s intent. Kraft v. Edgar, 138 Ill. 2d 178, 189, 561 N.E.2d 656, 661 (1990) (“In interpreting a statute, the primary rule, to which all other rules are subordinate, is to ascertain and give effect to the true intent and meaning of the legislature.”). “Legislative intent is best evidenced by the language used by the legislature, and where an enactment is clear and unambiguous a court is not at liberty to depart from the plain language and meaning of the statute by reading into it exceptions, limitations or conditions that the legislature did

not express.” *Id.*

The text of UTA § 3-5(4) provides, in pertinent part:

Exemptions. Use of the following tangible personal property is exempt from the tax imposed by this Act:

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(4) Personal property purchased by a governmental body, by a corporation, society, association, foundation, or institution organized and operated exclusively for charitable, religious, or educational purposes, or by a not-for-profit corporation, society, association, foundation, institution, or organization that has no compensated officers or employees and that is organized and operated primarily for the recreation of persons 55 years of age or older. ... On and after July 1, 1987, however, no entity otherwise eligible for this exemption shall make tax-free purchases unless it has an active exemption identification number issued by the Department.

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35 ILCS 105/3-5(4).

Beginning with the text of UTA § 3-5(4), I note that, since the term a governmental body is not defined within the UTA, it must be given its ordinary and popularly understood meaning. Texaco-Cities Service Pipeline Co. v. McGaw, 182 Ill. 2d 262, 270, 695 N.E.2d 481, 485 (1998). “Governmental” is an adjective meaning “1: of or relating to the governing authorities; ... 2: dealing with the affairs or structure of government or politics or the state ....” WordNet 2.0, (2003 Princeton University) (via dictionary.com).<sup>2</sup> When that adjective modifies the noun body, the term clearly refers to a distinct unit of government. While counsel for the Department did not offer any witnesses to explain what criteria the Department uses to determine whether an applicant for a use tax exemption identification number is a governmental body, I presume that such an inquiry ordinarily involves a determination whether the applicant is the State

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<sup>2</sup> Search completed on 11/2/05 via <http://dictionary.reference.com/search?q=governmental>.

itself, or some body of local government that is described in Article VII of the Illinois Constitution, which provides, *inter alia*, that “‘Municipalities’ means cities, villages and incorporated towns” [and that] ‘Units of local government’ means counties, municipalities, townships, special districts, and units, designated as units of local government by law, which exercise limited governmental powers or powers in respect to limited governmental subjects, but does not include school districts.” Illinois Constitution of 1970, Art. VII (Local Government) § 1; 5 **ILCS** 70/1.27 – 1.28 (Illinois’ Statute on Statutes).<sup>3</sup>

Moving from the text to the context of the provision, I note that § 3-5(4) exempts several different types of entities, and it divides those entities into two basic categories. The first category includes only one class, governmental bodies. I construe the singular number of the term “a governmental body” to include *any* governmental body, because “[w]ords importing the singular number may extend and be applied to several persons or things ....” 5 **ILCS** 70/1.03. The second category set forth in UTA § 3-5(4) includes four classes: (1) a corporation, society, association, foundation, or institution organized and operated exclusively for charitable purposes; (2) a corporation, society, association, foundation, or institution organized and operated exclusively for religious purposes; (3) a corporation, society, association, foundation, or institution organized and operated exclusively for educational purposes; and (4) a not-for-profit corporation, society, association, foundation, institution, or organization that has no compensated officers or employees and that is organized and operated primarily for the recreation of persons 55

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<sup>3</sup> Sections 1.27 and 1.28 of Illinois’ Statute on Statutes provides, respectively: “‘Municipalities’ has the meaning established in Section 1 of Article VII of the Constitution of the State of Illinois of 1970” and “‘Units of local government’ has the meaning established in Section 1 of Article VII of the Constitution of the State of Illinois of 1970.” 5 **ILCS** 70/1.27 – 1.28.

years of age or older. 35 **ILCS** 105/3-5(4). Thus, the context of UTA § 3-5(4) itself reflects that neither the first nor the second categories expressly include a non-profit corporation that acts as an agent or instrumentality of a governmental body.

Examining the context of UTA § 3-5(4), however, does not end by reviewing just the text and structure of the singular provision itself, but that provision must also be examined and read in context with the statute as a whole. Antunes v. Sookhakitch, 146 Ill. 2d 477, 484, 588 N.E.2d 1111, 1114 (1982). Section 3-5(4) is one subsection within a much broader section that summarizes all of the persons and the uses of property that the Illinois General Assembly expressly intended to make exempt from Illinois use tax. The term governmental body is used twice more within § 3-5 of the UTA, once in subsection 3-5(23) and again in subsection 3-5(32). Both of those sections provide different exemptions for the use of property purchased by a lessor that leases such property to “a governmental body that has been issued an active sales tax exemption identification number by the Department under Section 1g of the Retailers' Occupation Tax Act.” 35 **ILCS** 05/3-5(23), 3-5(32).

This broader review of the context in which a governmental body is used throughout UTA § 3-5 does not help *ABC* here, because where the legislature expresses, in a particular section of a broader tax act, all of the exemptions from taxation, the presumption is that any person or thing not described in that section was not intended to be exempt. *See People ex rel. Sherman v. Cryns*, 203 Ill. 2d 264, 285-86, 786 N.E.2d 139, 154-55 (2003) (discussing the principle of *expressio unius est exclusio alterius*, and describing that principal “as express[ing] the learning of common experience that when people say one thing they do not mean something else.”). In sum, neither the text nor the

context of UTA § 3-5(4) reflects that the Illinois General Assembly intended the term a governmental body to include both a governmental body itself, as well as any non-governmental body that acts as an agency or instrumentality of such an entity.

Because the primary issue in this matter is not similar to the issues of real property ownership and use that were confronted by the court in SIU Foundation, I think that the Illinois Supreme Court's recent decision in Carroll v. Paddock, 199 Ill. 2d 16, 764 N.E.2d 1118 (2002) is more applicable to this matter. That case involved the question whether "a not-for-profit charitable hospital and a not-for-profit mental-health-care organization are 'local public entities' within the meaning of section 1-206 of the Local Governmental and Governmental Tort Immunity Act ...." *Id.*, at 23, 764 N.E.2d 1122-23. The purpose of the Tort Immunity Act (TIA) is "to protect local public entities and public employees from liability arising from the operation of government." 745 ILCS 10/1-101.1 (2000). The TIA defines the term "[l]ocal public entity" as:

a county, township, municipality, municipal corporation, school district, school board, educational service region, regional board of school trustees, community college district, community college board, forest preserve district, park district, fire protection district, sanitary district, museum district, emergency telephone system board, and all other local governmental bodies. 'Local public entity' also includes library systems and any intergovernmental agency or similar entity formed pursuant to the Constitution of the State of Illinois or the Intergovernmental Cooperation Act as well as *any not-for-profit corporation organized for the purpose of conducting public business*. It does not include the State or any office, officer, department, division, bureau, board, commission, university or similar agency of the State.

745 ILCS 10/1-206 (emphasis added by court). After taking into account the ordinary and popular meaning of the term public business, the Illinois Supreme Court in Paddock concluded that the hospital and mental-health care organizations were not local public

entities entitled to immunity under the TIA. Paddock, 199 Ill. 2d at 28, 764 N.E.2d at 1125.

Should the issue ever arise, *ABC* may well cite TIA § 1-206, and Paddock, as authority for a ruling that *ABC* is entitled to qualified immunity as a local public entity, under the TIA. But that issue is not present here, nor would the Department's Office of Administrative Hearings be the place where such an argument would be made. Nevertheless, I still regard Paddock as relevant here for three reasons. First, the statutory definition of local public entities proves, to the extent that proof is necessary at all, that if the Illinois General Assembly had intended the otherwise ordinary and popular meaning of "a governmental body," as used in UTA § 3-5(4), to include a non-profit corporation that acts as an agency or instrumentality of a governmental body, it could have done so. Since the legislature did *not* make such an intent clear, that term should not be construed in a way that expands the class that the legislature did describe as being entitled to the exemption. Kraft v. Edgar, 138 Ill. 2d at 189, 561 N.E.2d at 661.

Second, the grouping of the different entities within the statutory definition of local public entity establishes that the Illinois General Assembly considered the bodies enumerated within the first sentence of the definition to constitute a particular set of governmental bodies, and that it also intended to include within that particular class "all *other* governmental bodies." Compare 745 ILCS 10/1-206 (emphasis added) with E & E Hauling, Inc. v. Ryan, 306 Ill. App. 3d 131, 136-38, 713 N.E.2d 178, 183-84 (1<sup>st</sup> Dist. 1999) (discussing the doctrine of *ejusdem generis* and the statutory definition of "paid-in capital," under 805 ILCS 5/1.80(j)). Thus, the statutory definition at issue in Paddock reflects that, while the legislature did not include "any not-for-profit corporation

organized for the purpose of conducting public business” within the class of the enumerated or the “other” governmental bodies, it nevertheless expressed its unequivocal intent that that latter class should be included within the statutory definition of a local public entity. In short, the legislature expressed its clear intent that separate classes of distinct entities should nevertheless be treated the same.

In this way, finally, the statutory definition of a local public entity confirms that it is primarily the job of the Illinois General Assembly to decide whether distinct entities may or must be treated similarly. The Illinois General Assembly, moreover, can provide that distinct entities may be treated similarly for some purposes, but not for other purposes. For purposes of the TIA, the legislature expressly articulated its intent that a particular class of non-profit corporation be *treated* the same way as a governmental body. But it would be profoundly inappropriate to conclude, after reading that statutory definition, that such non-profit corporations *are* governmental bodies, or that such non-profit corporations must be treated the same as governmental bodies for *all* purposes. In this case, the Illinois General Assembly has never expressed, anywhere within the UTA, that the term “a governmental body” was meant to include “any not-for-profit corporation organized for the purpose of conducting public business” or “a not-for-profit corporation that acts as an agency or instrumentality of a governmental body.” Therefore, I cannot construe UTA § 3-5(4) to exempt, as property purchased by “a governmental body,” property purchased by a non-profit corporation that acts as an agency or instrumentality of a governmental body. Wyndemere, 274 Ill. App. 3d at 459, 654 N.E.2d at 611.

For much the same reasons, neither federal administrative ruling cited by *ABC* persuades me to recommend that the Director grant its exemption application. Revenue

Ruling 63-20 responded to a request from an IRS employee for advice regarding “whether interest received on bonds issued by a nonprofit industrial development corporation organized under the general nonprofit corporation law of a state is excludable from gross income under section 103(a)(1) of the Internal Revenue Code of 1954.” Rev. Rul. 63-20. What *ABC* wants to convey by citing this ruling is not the ruling itself, which was that the interest paid to holders of bonds issued by the corporation at issue would not be excludable from gross income. *Id.* Rather, it wants to point out that the ruling would have been different had such bonds been issued by a non-profit corporation “on behalf of” a political subdivision of a state, such as *its* issuance of bonds on behalf of the Village of *ABC*. See Taxpayer’s Brief, p. 4.<sup>4</sup> It then asserts that the applicable Illinois exemption should be read to mean, “in essence, [that] ... purchase[s] made *on behalf of* a governmental body [are] exempt.” Taxpayer’s Brief, p. 4 (emphasis added).<sup>5</sup>

Section 3-5(4) of the UTA, however, does not say what *ABC* wants it to say.

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This is the particular passage of Rev. Rul. 63-20 that *ABC* wants noted:

The Internal Revenue Service holds that obligations of a nonprofit corporation organized pursuant to the general nonprofit corporation law of a state will be considered issued ‘on behalf of’ the state or a political subdivision thereof for the purposes of section 1.103-1 of the Income Tax Regulations, provided each of the following requirements is met: (1) the corporation must engage in activities which are essentially public in nature; (2) the corporation must be one which is not organized for profit (except to the extent of retiring indebtedness); (3) the corporate income must not inure to any private person; (4) the state or a political subdivision thereof must have a beneficial interest in the corporation while the indebtedness remains outstanding and it must obtain full legal title to the property of the corporation with respect to which the indebtedness was incurred upon the retirement of such indebtedness; and (5) the corporation must have been approved by the state or a political subdivision thereof, either of which must also have approved the specific obligations issued by the corporation.

<sup>5</sup>

In its brief, *ABC* refers to § 2-5(11) of the complementary Retailers’ Occupation Tax Act, which is the mirror image of UTA § 3-5(4).

Rather, it provides that “... property purchased *by* a governmental body ... [is exempt.]” 35 ILCS 105/3-5(4) (emphasis added). *ABC* is not a governmental body, and UTA § 3-5(4) does not exempt the use of property purchased *on behalf of* a governmental body, by someone other than a governmental body. Thus, *ABC* cannot make tax free purchases on behalf of *ABC*.

On a related point, the private letter ruling *ABC* cites is a recent IRS response to a bond “[i]ssuer’s request for a ruling that the [issuing] Corporation meets the criteria of Revenue Ruling 57-128 and therefore is an instrumentality of a political subdivision of State for purposes of § 141 of the Internal Revenue Code (the ‘Code’).” PLR 200406003, 2004 WL 226531 (IRS PLR). Revenue Ruling 57-128, in turn, sets forth factors that the IRS takes into account when determining whether an entity is an instrumentality of one or more governmental units, for purposes of Code § 141. *Id.*<sup>6</sup> *ABC* then argues that, “if this Court were to apply the IRS’s test [under Rev. Rul. 57-128], the Court must find that the *ABC* is an agent or instrumentality of the Village of *ABC* ....” Taxpayer’s Brief, p. 5.

What *ABC* wants, therefore, is for me and/or the Director to attempt to resolve a matter that is properly the province of the IRS, when the only relevant issue here is whether *ABC* is a governmental body. Since the Department did not file a brief in this matter, I do not know what response it has regarding *ABC*’s argument that I, or the Director, should consider it to be an agent or instrumentality of *ABC*. Of course, were

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<sup>6</sup> The factors are: (1) whether the organization is used for a governmental purpose and performs a governmental function; (2) whether performance of its function is on behalf of one or more states or political subdivisions; (3) whether there are any private interests involved, or whether the states or political subdivisions have the power and interests of an owner; (4) whether control and supervision of the organization is vested in public authority or authorities; (5) whether express or implied statutory or other authority is necessary for the creation and/or use of the organization, and whether this authority exists; and (6) the degree of financial autonomy of the entity and the source of its operating expenses. PLR 200406003, 2004 WL 226531 (IRS PLR).

that factual conclusion relevant to the issue here, I would also have to take into account that *ABC* did not introduce into evidence at hearing a copy of a ruling from the IRS which states that that agency has concluded that *LPFC* is such an entity. Additionally, I am not persuaded why I should conclude that operating a hotel constitutes a governmental function. But again, the Department is not the proper agency to decide whether *ABC* is an instrumentality of *ABC* for purposes of Code § 141, and the IRS might not be bothered by my unaddressed concerns.

Finally, even if the IRS were to conclude that the interest that *ABC* anticipates paying to the holders of the bonds it issues will be excludable, once paid, from such holders' gross income, that does not mean that *ABC* must be considered to be a governmental body, for purposes of UTA § 3-5(4). Similarly, a conclusion by the IRS that *ABC* is, in fact, an instrumentality of *ABC* does not mean that *ABC* is, itself, a governmental body, for purposes of UTA § 3-5(4), as *ABC* clearly would be. Illinois Constitution of 1970, Art. VII (Local Government) § 1; 5 **ILCS** 70/1.27. That is because exemption and other decisions made by the IRS in favor of a person, pursuant to federal income tax law, do not automatically inure to the benefit of the same person, pursuant to Illinois' tax laws. See Eden Retirement Center, Inc., 213 Ill. 2d at 290, 821 N.E.2d at 250 ("it is well settled that the requirement of federal tax-exempt status cannot be deemed dispositive"); Bodine Electric Co. v. Allphin, 81 Ill. 2d 502, 510, 410 N.E.2d 828, 832 (1980) (fact that certain deductions are allowed under federal income tax law does not create a parallel set of Illinois deductions).

### **Conclusion:**

I recommend that the Director finalize the Department's tentative denial of *ABC*'s

application for an exemption identification number.

Date: 11/4/2005

John E. White  
Administrative Law Judge